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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 685

SKYLINE HOMES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Now comes petitioner, Skyline Homes, Inc., an Indiana corporation, by Larry S. Davidow, its attorney, and respectfully shows unto this Court as follows:

OPINION OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

That on the 11th day of October, 1963, the United States Court of Appeals for the Fifth Circuit, in the case of *Skyline Homes, Inc., petitioner v. National Labor Relations Board*, filed its Opinion granting petitioner's application to set aside the order of the National Labor Relations Board in reference to claimed discriminatory layoffs and recall and denying petitioner's application to set aside the findings and conclusions of the National Labor Relations Board with respect to claimed violation of Section 8(a)(1) of the Labor Management Relations Act of 1947 as amended (61 Stat. 136, 73 Stat. 519, 29 USC Sec. 151 *et seq.*) copy of which Opinion is hereto appended (p. 15).

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

1. On November 22, 1963, a decree of the United States Court of Appeals for the Fifth Circuit was entered, copy of which Decree is appended hereto (p. 34).

2. On October 30, 1963, petitioner caused its petition for rehearing to be filed only as to the Court's affirmation of the Board's finding as to the interrogation and alleged threatening of employes and refusal to bargain in good faith, copy of which petition is hereto appended (p. 28).

3. On the 13th day of November, 1963, the United States Court of Appeals for the Fifth Circuit entered its order denying petitioner's petition for rehearing, copy of which is appended hereto (p. 33).

4. On November 22, 1963, an order was entered in the United States Court of Appeals for the Fifth Circuit granting a stay for a period of thirty days to enable petitioner to apply for and obtain a Writ of Certiorari from the Supreme Court of the United States, copy of which order is appended hereto (p. 37).

5. Petitioner files its petition for Writ of Certiorari in pursuance of Title 28, Sec. 1254 U. S. Code Annotated, and Rule 19 of the Supreme Court Rules.

QUESTIONS FOR REVIEW

The questions presented for review are:

(a) The right of an employer (petitioner) to express its opinion on the matter of labor unions and related subjects as long as it did not express "any threats of reprisal or force or promise of benefit" as stated in Sec. 8(c) of the Labor Management Relations Act of 1947, as amended, 29 USCA 158(c), which provides:

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this chapter, if such expression contained no threats of reprisal or force or promise of benefit."

(b) The interpretation of the said Labor Management Relations Act and the rules of the National Labor Relations Board which preclude the determination of the question of representation and election until the Board has passed upon and disposed of charges of unfair labor practice, which petitioner believes was erroneously interpreted by the Court of Appeals in the instant case.

Section 10(m) of the Labor Management Relations Act of 1947 as amended, 29 USCA 160(m) provides:

> "Whenever it is charged that any person has engaged in any unfair labor practice within the meaning of subsection (a)(3) or (b)(2) of Section 158 of this title, such charge shall be given priority over other cases, except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (1) of this section as amended." * * *

Petitioner contends that the Court of Appeals applied an erroneous rule in reviewing the evidence in support of the findings of the National Labor Relations Board complained of and failed to consider the decision of this Court in the case of *International Ladies' Garment Workers Union v. N.L.R.B.*, 366 U.S. 731, 6 L. Ed. 2d, 762; and that there are also conflicting decisions of the several Courts of Appeals on the questions involved, as appears by the cases cited in the Court's Opinion and the cases relied upon by petitioner hereinafter cited.

CONCISE STATEMENT OF THE CASE

Petitioner shows that it is an Indiana Corporation with its principal place of business in the City of Elkhart, Indiana, and has a manufacturing plant in the City of Ocala, Florida, where it manufactures mobile homes.

On or about June 17, 1960, representatives of the United Brotherhood of Carpenters and Joiners of American called at the plant of petitioner in Ocala, Florida, demanding that petitioner negotiate a union contract on behalf of the employees of the petitioner; that petitioner's representative informed the union spokesman that he had no authority to enter into any negotiations but would communicate with the home office in Elkhart, Indiana; that in the course of the discussion that ensued at this meeting, the union representatives made known their claim that they had a majority

of the employes at the Ocala, Florida, plant signed up and that if petitioner did not agree to negotiate with them, an election would be held under the auspices of the National Labor Relations Board and if the union received a majority vote that the petitioner would have to negotiate with the union;

Petitioner further says that before it was able to have its legal representative meet with the union, the Carpenters Union filed a charge against the employer on June 23, 1960, alleging unfair labor practices.

That on August 2, 1960, an Amended Charge was filed against petitioner, repeating the charges made on June 23, 1960, and adding the further charge that petitioner had refused to recognize and bargain with the Carpenters Union.

That the Union, without giving the plaintiff a reasonable opportunity to consider the problem created by its demands, filed the aforesaid Charges, which resulted in a formal complaint being issued, to which petitioner filed an answer and on which a hearing commenced October 11, 1960.

That on or about June 26, 1961, the Trial Examiner issued an Intermediate Report, being Case No. 12-CA-1517, to which reference is hereby prayed and made a part hereof by such reference; that in this Report the Trial Examiner dismissed the charge of unfair labor practices in the laying off of certain employes; did find the employer guilty of unfair labor practices in questioning its employes and refusing to negotiate with the union, and recommended that an order be entered to require that petitioner desist from these unfair labor practices.

That petitioner seasonably filed an appeal to the National Labor Relations Board on the issues of the adverse findings

of the Trial Examiner; that the National Labor Relations Board's Counsel appealed from the finding that the petitioner had not been guilty of unfair labor practice by the laying off of certain employes.

That on November 14, 1961, the National Labor Relations Board issued its Decision and Order, to which reference is hereby made and by such reference made a part hereof, in which Decision and Order the National Labor Relations Board reversed the finding of the Trial Examiner on the subject of layoffs of petitioner's employes and wholly and completely ignored the issue raised by the petitioner as to the right of the petitioner to have an election by which it would be tested whether its employees wanted the Carpenters Union to be their bargaining agent, and sustained the other findings of the Trial Examiner.

That as appears by the Affidavit of Arthur J. Decio, president of petitioner corporation, filed as part of its petition for rehearing in the Circuit Court of Appeals for the 5th Circuit, of approximately 30 employes who were in the employ of petitioner in Ocala, Florida, in June, 1960, only four were employed as of October 22, 1963, the rest having left the employ of petitioner voluntarily; that there are now employed in the Ocala plant of petitioner 50 employes, so that 46 could not have been represented by the union in June, 1960.

ARGUMENT AMPLIFYING REASONS RELIED UPON

Question (a)

The Opinion of the Court of Appeals would indicate that the Court of Appeals and the National Labor Relations Board acted under a misapprehension of the facts and the law on the question of the right of petitioner-employer to express its opinion. The record abundantly supports the contention of petitioner that there were no threats of reprisal or force or promise of benefit in the interrogation of and communications to the employes.

In the case of *National Labor Relations Board v. Rockwell Manufacturing Company*, Circuit Court of Appeals for the Third Circuit, reported in 271 Federal 2d, 109, the Court held that hostility of an employer to a union or union bias is not an unfair labor practice, and on page 111 said:

> "Remarks made by foreman in conversations with employes did not constitute unfair labor practice where each remark was either permitted as a non-coercive interrogatory, or a vague warning not coupled with a threat of reprisal, or a prediction not coupled with a threat to use the employer's economic power to make the prediction a reality."

In the instant case there is absolutely no proof whatever of any threats made by the employer of reprisal or any act of coercion. This is clearly supported by the finding of both the Trial Examiner and the Court of Appeals that the layoffs were in the usual, ordinary course of business and that the recalls showed no discrimination as to union membership.

In the case of *N.L.R.B. v. Fullerton Publishing Co.*, U.S. Court of Appeals for the 9th Circuit, reported in 283 Fed. 2d. 545, this Court held (551):

> "But, it is well settled that the mere questioning of employees, standing alone, is not an unfair labor practice. *National Labor Relations Board v. McCatron*, 9th Circuit, 1954, 216 F. 2d. 272, Certiorari denied, 75 S. Ct. 356, 99 L. ed. 738."

Burke Golf Equipment Corp. v. N.L.R.B., 284 F 2d 943, Dec. 28, 1960, 6th Circuit (945):

> "The employer had a right to talk to his employees so long as he did not threaten, intimidate or coerce them with respect to their union activity. There was no substantial evidence that the employer by interrogating its employees threatened, coerced or intimidated them or violated Section 8(a)(1) of the Act, in any respect."

N.L.R.B. v. T. A. McGahey, et al., 5th Circuit, 233 F. 2d 406. May 18, 1956. Page 409:

> "This is not to penalize the employer because of antiunion bias for we recognize that antiunion bias, strong convictions against union or opposition to the underlying philosophy of the Labor Management Relations Act is not of itself an unfair labor practice. In a free democracy, it is the citizen, not the government, who fixes his own beliefs. The personal views of McGahey; or his colorful, forceful means of expression, do not, unless voiced in manner or circumstances warranting the inference of a purpose to thwart, impede or discourage the plain and statutory rights of employees, violate the law, or infuse power in the Board to coerce a change of heart. * * * McGahey must, of course, obey the law, but he need not believe it. * * *"

And from pages 409 and 410:

> "Nor is it to punish the employer because McGahey made inquiries whether the employees did or did not desire union representation. Had these been casual, moderate inquiries by McGahey unrelated to evidence indicating that employees had ground to consider them as forecasting reprisals, these acts would not have been an unfair labor practice. * * * But interrogation becomes unlawful when it is part of the means by which the employer's hostility carries with it the purpose to retaliate against union sympathizers, and by threat of job or other reprisals, coerce them into a vote of action which does not express their free will."

Question (b)

Petitioner contends that the Court of Appeals erroneously interpreted the rule in reference to the questions of representation and determination. The Court in its opinion

in support of its position quotes the case of *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62, 76 S. Ct. 559, 100 L. Ed. 94. A reading of this case clearly shows its inapplicability. The question there was the refusal on the part of the employer to recognize and bargain with the Union because the Union had failed to file financial and other data, as well as anti-Communist affidavits required by the law. This Court held that the non-compliance by the Union did not preclude it from representing an appropriate unit of employes if a majority of those employes gave it authority to do so.

The petitioner respectfully submits that the Opinion of the Court of Appeals in the instant case is in direct conflict with the decision of this Court in the case of *International Ladies' Garment Workers Union, A.F.L.-C.I.O. v. National Labor Relations Board* and *Bernhard-Altmann Texas Corporation*, 366 U.S. 731, 6 L. ed 2d 762; 81 S. Ct 1603, decided June 5, 1961. In this case, the employer extended, and the Union accepted, recognition of the Union as exclusive collective bargaining representative of certain of employer's employes. It was brought out that the Union actually represented a minority of the employes. The Board found that by extending such recognition, even though done in the good faith belief that the Union had the majority of the employes, the employer interfered with the organizational rights of its employes, in violation of Section 8(a)(1) of the National Labor Relations Act and therefore it constituted an unfair labor practice. It appeared also that the Union representative had asserted that it had in fact secured membership cards from a majority of employes in the unit. Neither employer nor the union made any effort at that time to check the cards in the Union's

possession to ascertain with any degree of certainty that it did in fact represent the majority.

This Court upheld the opinion of the Court of Appeals that the recognition of the minority union deprived the majority of the employes of their guaranteed right to choose their own representative. This Court further held that the agreement arived at between the Union which was recognized and the employer "must fail in its entirety. It was obtained under the erroneous claim of majority representation. Perhaps the employer would not have entered into it if it had known the facts." (767) This Court went on to say that the Act guaranteed employes freedom of choice and majority rule and that granting exclusive bargaining status to an agency selected only by a minority impressed that agency upon the non-consenting majority and that there could be no clearer abridgement of the act which assured to employes the "right "to bargain collectively through representatives of their own choosing," or "to refrain from such activity." (767)

This Court on page 768 went on to say:

> "We find nothing in the statutory language prescribing scienter as an element of the unfair labor practices here involved. The act made unlawful by §8(a)(2) is employer support of a minority union. Here that support is an accomplished fact. More need not be shown, for, even if mistakenly, the employees' rights have been invaded. It follows that prohibited conduct cannot be excused by a showing of good faith.
>
> "This conclusion, while giving the employee only the protection assured him by the Act, places no particular hardship on the employer or the union. It merely requires that recognition be withheld until the Board-conducted election results in majority selection of a representative."

In the case at bar the petitioner-employer did question the union's assertion that it represented a majority of its employes. Before any action could be taken for a proper representation election, the Union filed its charges of unfair labor practices, which thereupon precluded any action for an election until the determination of the unfair labor practices charges.

In the instant case, petitioner shows that it would be manifestly unfair at this stage of the proceeding to require the employer to recognize the union as representing a majority of its employes, in view of the fact that conditions have so materially changed since the original hearing. Only four of the original employes are presently employed. There are now approximately 50 employes. The record clearly shows that petitioner-employer filed its appeal seasonably and that the lapse of time between the finding by the Trial Examiner and the disposition of the appeal by the Circuit Court of Appeals was without any fault on the part of the petitioner.

It would be manifestly inequitable to require petitioner to bargain with the union and post the notices required by the Decree when there is no showing of any kind whether the union represents any of petitioner's employes at this time and in the face of petitioner's position that it engaged in no unfair labor practices. For petitioner to comply with the terms of the decree under the circumstances would amount to coercing its employees to join the union.

In the case of *N.L.R.B. v. Dow River Mills, Inc.*, U. S. Court of Appeals, 5th Circuit, 274 Fed. Reporter, 2d Series, 381, the union had filed its petition for representation and before the order for election was issued, the union filed a charge of unfair labor practices. The Board then dismissed the representation petition upon the union's motion for withdrawal. The Court of Appeals held that

a representation proceeding is inconsistent with a hearing on unfair labor practices, and on page 387 said:

> "Our decision is not a criticism of the Board for the dismissal, as such, of the representation proceeding. There is a certain logical consistency to its position. The charge and complaint in essence claim that the Employer is guilty of an unfair labor practice because it refuses to recognize a union having a majority status. A representation proceeding, on the other hand, is premised on the express interim conclusion that there is a doubt as to majority representation. Both proceedings ought not to be maintained simultaneously since, as the Board held here, 'a representation proceeding and an unfair labor practice proceeding alleging refusal to bargain are mutually inconsistent.'"

and again on page 387:

> "The Union from December 16 on claimed a majority. The Employer immediately and continuously disputed this. Neither won a resounding victory, and the final result was both narrow and late in coming. In the meantime what was this Employer—holding this genuine doubt which nearly turned out to be an actuality—to do? Did the price of good faith mean that he must capitulate? If he was entitled to an opportunity to consider and evaluate it, how long was he given?"

And on page 388:

> "How was this critical fact to be determined? True, an employer does have the legal right to interrogate to find out. *Parks v. Atlanta Printing Pressman and Assistant's Union No. 8*, 5 Cir., 1957, 243 F. 2d 284, 288, especially at note 7, certiorari denied 354 U.S. 937, 77 S. Ct. 1397, 1 L. Ed. 2d 1537, on rehearing 5 Cir., 248 F. 2d 386. But like Odysseus, he stands almost helpless as he makes the peri-

lous passage between Scylla and Charybdis. If he makes a simple inquiry of each employee and accepts the simple answer, the very pressures apprehended may well bring about the employee's confirmation as well. If he probes deeper, the inquiry unavoidably becomes an investigation and soon it is inescapable that there be insinuations or intimations in terms of relative evaluation of union or non-union conditions. At that point, undefined and undefinable, the inquisitor trespasses either on forbidden ground or flounders in the Scyllonian bog. *Lane Cotton Mills Co. v. Phoenix Mut. Ins. Co.*, 1923, 204 Ky. 491, 499, 54 S.W. 461, 463; 58 A.L.R. 1031, 1038, surrounding it so that what started out to be a means of compliance with law is turned into an affirmative charge of an unfair labor practice."

And from page 389:

"Under the special circumstances of this case, it was reasonable for the Employer to assume that the law would resolve its good faith doubt concerning the Union's majority by the election requested and shortly ordered. The subsequent dismissal of those proceedings with the filing of the unfair labor practice complaint cannot deprive its antecedent actions of that cloak of reasonableness and good faith doubt. The order as to Section (a)(1) may not, therefore, stand."

RELIEF

Wherefore, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court, and that upon the hearing of said Writ of Certiorari, the action of the Circuit Court of Appeals of the 5th Circuit affirming the findings of the National Labor Relations Board complained of be reversed and the Decree entered in said cause be set aside and remanded for the entry of a decree in keeping with petitioner's prayer.

Respectfully submitted.

LARRY S. DAVIDOW,
Attorney for Petitioner.

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 19332

Skyline Homes, Inc.,
Petitioner,
versus
National Labor Relations Board,
Respondent.

Petition for Review of an Order of the National Labor Relations Board.

(October 11, 1963)

Before Tuttle, Chief Judge, and Jones and Gewin, Circuit Judges.

Jones, Circuit Judge: The petition of Skyline Homes, Inc. asks that this Court set aside an order of the National Labor Relations Board directing it to cease and desist from stated practices in violation of Sections 8(a)(1), (3) and (5) of the National Labor Relations Act, 29 U.S.C.A. 151 *et seq.* The Board seeks enforcement of its order. The decision and order of the Board are reported in 134 NLRB 155.

Submitted for our determination are the questions as to whether there is substantial evidence on the record

as a whole to support the Board's findings (a) that Skyline Homes laid off eighteen employees in violation of the provisions of Section 8(a) (3) and (1) of the Act; (b) that it interrogated and threatened its employees in violation of Section 8(a)(1) of the Act; and (c) that it refused to bargain in good faith with the United Brotherhood of Carpenters and Joiners in violation of Section 8(a)(5) and (1). We answer the first question in the negative and the second and third in the affirmative.

Some of the facts are undisputed. Skyline Homes is an Indiana corporation with a plant in Ocala, Florida. It manufactures mobile homes, commonly known as trailers. Skyline Homes moved into its present Florida location on May 1, 1960.[1] On May 30 and 31, the plant superintendent, Ralph Kreischer, placed an advertisement for help in the Ocala Star-Banner as follows:

> "Skyline needs help in all departments. Only experienced mobile home builders or carpenters need apply. Apply in person to Ralph Kreischer any time at new industrial park near Taylor Field."

The move to the new plant and changes made in the models of trailers had resulted in complaints from some employees that they were unable to make their piece rates. The placing of the advertisement and the hiring of new employees followed. Between June 1 and June 17, fifteen men were hired, rehired, or recalled to work.

Union activity started in the plant on June 11. By Friday, June 17, seventeen out of petitioner's thirty-three employees had signed union authorization cards. That morning three union representatives called on resi-

[1] All dates referred to hereafter are in 1960.

dent manager James C. Overman. The spokesman of the trio, Wafren Conary, told Overman that their union represented a majority of his workers and they wished to negotiate a contract for them. The discussion lasted for an hour and many aspects of unionization were discussed. Among other things Overman asked for and got a lengthy explanation of election proceedings. Overman told the union representatives that he was not authorized to bind the company. He requested that he be furnished with a contract form. This was furnished to him after the conference. It contained the usual terms and clauses. Overman sent the contract form to the company's home office in Indiana. A meeting was arranged between Overman and union officials for the following Tuesday morning. After the Friday meeting Overman called petitioner's president, Arthur Decio, to inform him of developments. The latter told Overman that he was not an officer or director of the company and could not negotiate with the union.

At the end of that work day Kreischer, the plant superintendent, announced the layoff of sixteen men. The employer did not know which, if any, of those laid off had signed up with the union. It appeared later that eight were union adherents and the other eight were not. The following Monday Kreischer recalled one of the non-signers and laid off two more union men.

On Tuesday, Adlai A. Pittman, an organizer of the union, called Overman to report that Warren P. Conary, who was to negotiate for the union, would not arrive in time for the meeting scheduled for ten o'clock that morning and to request that it be postponed until one or two o'clock that afternoon. Overman replied that it would not be worth their while to come since he had been informed that he had no authority to deal with them. That

was the last conversation between the union and the company. On Thursday, June 23, the union filed unfair labor practice charges with the Board.

On the same day, June 23, Overman again talked to Skyline Homes' president about the union. Decio told Overman that counsel for the company, Larry S. Davidow, would be in touch with him and would be down the next day to discuss, or negotiate with, the union. He arrived early in the morning on Friday, June 24. Overman met his plane and on their way into Ocala stopped to pick up his mail. In it was a registered letter from the Board notifying the petitioner of the charges filed against it by the union. Mr. Davidow concluded that it would be no use trying to deal with the union while the charges were pending.

The Board found, overruling the Trial Examiner, that the layoffs of June 17 and 20 constituted a violation of Section 8(a)(3). We shall discuss the two layoffs separately and in order. To sustain its determination of discriminatory motivation, the Board relies on the finding that before the layoff on June 17 (1) Overman questioned almost all of the employees, either individually or in groups, about the union, and (2) that someone in the company's home office talked to Kreischer to ascertain whether Kreischer knew who "the instigators" were.

In regard to the first finding, it appears that the Board was mistaken in its reading of the record. It is not shown that Overman questioned any employee prior to the first layoff on Friday afternoon. The Trial Examiner did not so find.

As to the second finding the Trial Examiner accepted the testimony of employee Dodd that he overheard Kreis-

chor, in a conversation with someone at the Indiana headquarters spiced with "yes sirs" and "no sirs," say, "Yes, sir, we know approximately how many X and Yes, we definitely know who the instigators is [sic]." Kreischer testified that he did not recall having a conversation with the company headquarters that day and flatly denied ever having made the remarks Dodd attributed to him. However, the Trial Examiner credited Dodd's testimony and we accept his finding. *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 82 S. Ct. 853, 7 L. Ed. 2d 829. Nevertheless, the Trial Examiner did not think that this constituted sufficient evidence of a discriminatory motive to warrant a finding of a Section 8(a)(3) violation. We agree. *Universal Camera Corp. v. NLRB*, 340 U. S. 474, 71 S. Ct. 456, 95 L. Ed. 456. As to the first layoff, there was no other evidence of discrimination. The Examiner found, and the Board accepted his finding, that there was no evidence that the petitioner had any knowledge of union activity in the plant prior to the meeting with the negotiators on the morning of June 17. "Knowledge by an employer of the discharged employees' union activities is a vital element in the proof of a violation of Section 8(a)(3)." *NLRB v. Atlanta Coca-Cola Bottling Co.*, 5th Cir., 1961, 293 F. 2d 300, 309, rehearing denied, 296 F. 2d 896; see *NLRB v. Moore Dry Kiln Co.*, 5th Cir., 1963, ... F. 2d ....; *Bituminous Material & Supply Co. v. NLRB*, 8th Cir. 1960, 281 F. 2d 365; *Osceola County Co-op. Creamery Ass'n v. NLRB*, 8th Cir. 1958, 251 F. 2d 62; *cf. NLRB v. J. Mitchko, Inc.*, 3rd Cir. 1960, 284 F. 2d 573. Here there was only insignificant evidence that the company knew of any specific employee being engaged in union activities. *See Dan River Mills, Inc. v. NLRB*, 5th Cir., 1960, 274 F. 2d 381, 384. Overman claimed that he had decided to have a fairly comprehensive layoff on June 13 and that Kreischer had made up

a list for this purpose by the fifteenth. The Board has deplored the inconsistency of petitioner's position in hiring fifteen men in less than three weeks and then laying off eighteen at the end of that period. While we agree that the employer must often show a valid business justification to counter evidence of discriminatory motivation, we think the economic considerations are beside the point where there is insufficient evidence to show that the employer had such knowledge as would permit discrimination. Overman ordered the layoff of sixteen employees, about whose union sympathies and affiliations the company knew nothing, half of whom, it turned out, had signed union cards. We could speculate that he took a "stab in the dark," hoping to rid himself of the "wrong" people, that he reduced his working staff so that his subsequent antiunion campaign would be more manageable, and so forth. But none of this arises above the level of conjecture. See *Bituminous Material & Supply Co. v. NLRB*, *supra*, at 367. There were economic reasons and subsequent recalls which Overman and Kreischer relied upon to justify their actions, but these we consider irrelevant. Without significant evidence that Overman or Kreischer knew of any individual union participation, and a failure to show that he struck at a suspected group of employees, his reasons for laying off these people were his business. It is not the place of the Board or the courts to interfere with the managerial prerogative. *NLRB v. McGahey*, 5th Cir. 1956, 233 F. 2d 406, 412-13; *NLRB v. Coats & Clark, Inc.*, 5th Cir. 1956, 231 F. 2d 567, 572-73; *Portable Elec. Tools, Inc. v. NLRB*, 7th Cir. 1962, 309 F. 2d 423; *NLRB v. Montgomery Ward & Co.*, 8th Cir. 1946, 157 F. 2d 486.

We reach the same conclusion with regard to the two employees laid off on the succeeding Monday. Neither the Trial Examiner nor the Board made any distinction

between these two separate layoffs, the one holding both economically motivated, the other holding them in violation of Section 8(a)(3) and (1). Looking to the record to ascertain whether there is evidence to sustain the Board's finding with respect to the second layoff, we note the evidence that Kreischer visited employee Luzader at his home and inquired whether he or employee Haroff had signed cards. Both had been laid off the preceding day. Luzader answered that he had signed after the layoff but he did not believe that Haroff had. Kreischer also asked if Luzader knew who the instigators of the union movement were. Luzader replied in the negative. On Monday Haroff was called back and two union men, Mielczarczyk and Hardin, were laid off.

The finding here of a discriminatory layoff in violation of Section 8(a)(3) must fall for the same reasons as the June 17 finding. There is no indication that Skyline Homes had gained any knowledge that the two employees laid off Monday morning had signed union cards. The statement of Luzader that he did not think Haroff had signed a union card did not provide a basis for a belief that Haroff was not a union member.

Aside from this, the Board relies on events subsequent to the layoffs to sustain its position. The company asserts that it gave all the laid off employees, save one, an opportunity to return to work. The Board, on the other hand, states that,

> "The record reflects that employee Branton left town and was presumably unavailable for recall and that seven other employees were laid off and not recalled: Bacon, Knight, B. Lloyd, R. Lloyd, Penney, Stokes, and Watts. Significantly all of these employees had signed authorization cards. It should be noted,

however, that there is some question as to whether or not Penney was offered reinstatement."

The Board uses the recall often of the laid off employees as evidence of the incredibility of the economic reasons for the layoff. Then from the pattern of the recalls it again draws an inference of discrimination. But the Board's statement quoted above must be set against the record. If it does not square, then the inference cannot stand.

It was admitted by Kreischer and Overman that employee Grover Watts had not been asked to return to work. By the testimony of Kreischer it was shown that Watts was addicted to drinking and fighting, and was continually getting mixed up with the law and missing work with the result that there was an interference with plant production. Kreischer testified that shortly before the layoff he spoke to Watts about missing work, and the latter had told a story of an ailing sister whom he had gone out of town to attend. Kreischer warned him that if he were lying, it would be "the end." According to Kreischer he found out that Watts had in fact been in another scrape and told him on June 21 or 22 that he could not come back to work after the layoff. Overman confirmed Kreischer's general observations about Watts.

It was stipulated at the hearing that employee Bacon was no longer in the State of Florida. Employee Penney, whom the Board concedes may have received a proper offer of reinstatement, testified that his wife visited Mr. Overman who told her that he had a letter on his desk asking Penney to return to work the following Monday. Penney testified that he never went back to work because he never got the letter. But he also admitted that he had the impression that he was supposed to reassume his posi-

tion. Knight, on the other hand, had not been recalled and there is no indication that he was ever again offered employment with Skyline Homes. Employee Robert Lloyd, who was never recalled, testified that he had just been graduated from high school, hoped to go to college, and took the job with the understanding that it would just last for the summer. Bruce Lloyd said flatly that he had refused an offer to return. There is no evidence that employee Stokes had ever been recalled.

It is our conclusion that a pattern of discriminatory recalls depends on the failure to offer reemployment to Knight and Stokes, and a possibility that there was a failure to do so in the case of Penney. We exclude Robert Lloyd from this group because, aside from the fact that he was hired as temporary help, most of the recalls were in the fall at the end of petitioner's traditionally slack season. In regard to Watts, the testimony that he was let go for the reasons aforementioned was not only uncontradicted, but neither the Trial Examiner nor the Board indicated they disbelieved Overman and Kreischer. We are driven to the conclusion that the Board's inferences in this regard are not supported by substantial evidence on the record considered as a whole.

We now consider the portion of the Board's decision with respect to warning or interrogating employees in violation of Section 8(a)(1). The conclusions upon which the Board relied to support its order in this regard are supported by substantial evidence. A recitation of the evidence on this phase of the case would serve no useful purpose. However, it may be noted that except for the incident involving Kreischer and Luzader on June 18, all of the acts complained of occurred after the final layoffs on June 20.

The Board adopted the Trial Examiner's finding that Skyline Homes had failed to bargain in good faith with the union. The petitioner argues that Overman proceeded on the assumption that an election would be necessary and that the filing of the charges precluded the election for the time being, rendering further meetings with the union useless. The Board, on the other hand, contends that certification is not a prerequisite to the right of a union to be recognized and the employer must recognize the union unless it entertains a good faith doubt of the union's majority status. It is clear that the filing of unfair labor charges by a union does not relieve an employer of its obligation to bargain in good faith under Section 8(a)(5). *NLRB v. Taormina*, 5th Cir. 1953, 207 F. 2d 251; *NLRB v. Harris*, 5th Cir. 1953, 200 F. 2d 656. Nor must a union be certified by the Board to receive recognition. *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U. S. 62, 76 S. Ct. 559, 100 L. Ed. 94; *NLRB v. Philamon Laboratories, Inc.*, 2nd Cir. 1962, 298 F. 2d 176, 179; *NLRB v. Sunrise Lumber & Trim Corp.*, 2nd Cir. 1957, 241 F. 2d 629, cert. den., 355 U. S. 818, 78 S. Ct. 22, 2 L. Ed. 2d 34. Moreover, as the Board correctly points out, an employer cannot resume recognition pending an election unless it doubts in good faith that the union has a majority. *NLRB v. Philamon Laboratories, Inc.*, *supra*, at 179. But, given this good faith doubt, the employer need not negotiate until an election has demonstrated the union's majority status in the appropriate bargaining unit. *NLRB v. Jackson Press*, 7th Cir. 1953, 201 F. 2d 541, 544. And "it is also the Board's settled policy not to conduct representation elections during the pendency of unfair labor practice charges." *NLRB v. Trimfit of California*, 9th Cir. 1954, 211 F. 2d 206, 209 n. 2; see NLRB Rules & Regulations §102.95(b). Therefore, in these circumstances, the employer can hardly be called upon to press for an election to which it is not entitled.

The decision here turns then on the crucial question of good faith doubt. An employer may not be forced to deal with a union if it has a good faith reasonable doubt that the union has a majority. Admittedly, it would seem harsh that the union in this situation must face an election with unfair labor practices threatening a fair result, and if it loses, then file charges with the Board. But a different rule would allow the union, by filing charges, to coerce an employer, entertaining a bona fide doubt, to bargain without benefit of an election under pain of a Section 8(a)(5) charge. *Cf. NLRB v. Sherrill*, 5th Cir. 1963, 314 F. 2d 43, 44.

The facts of this case, however, render the Skyline Homes' claim of good faith untenable. Union representative Conary told Overman that his organization represented a majority of the employees. This was undisputed. The only indication of doubt in the evidence was Overman's testimony that "I may have said, 'Well, how do I know [that the union represents a majority]?' I don't recall saying it, I think some time ago. However, I didn't pursue the subject or request them for proof that they did have the majority. I questioned it in my own mind." Thereafter, the company's behavior was wholly inconsistent with the entertaining of a good faith doubt. Overman requested and received a contract from the union and sent it on to Decio; the company sent its counsel to Ocala to take some action in regard to the union, presumably to negotiate. It is apparent that Overman anticipated an election and directed his energies to the union's defeat in that election. However, these actions do not establish the existence of a real doubt as to the union's majority. He made the mistake of believing that majority or no majority an election would be necessary. This view cannot be sustained. On the contrary there must be some manifestation of doubt to the

union. In *NLRB v. Southeastern Rubber Mfg. Co.*, 5th Cir. 1954, 213 F. 2d 11, this Court sustained a Board inference that the employer did not refuse to bargain because of a good faith doubt as to the union's majority, but rather because of antiunion animous demonstrated after the refusal. There the union notified the employer on May 12 that it had become the majority representative of the plant employees. The company did not answer the letter. After reciting various 8(a)(1) violations committed thereafter the Court said:

> "Furthermore, the facts and circumstances here shown support the Board's inference that respondent's refusal to bargain on and after May 12th was not motivated by a good faith doubt as to the union's majority status, but by antiunion animus and respondent's desire to sway its employees from their union affiliation through intimidation and otherwise coercive tactics." 213 F. 2d 11, 15.

Cf. NLRB v. Poultry Enterprises, Inc., 5th Cir. 1953, 207 F. 2d 522. Likewise, in *NLRB v. Trimfit of California*, 9th Cir. 1954, 211 F. 2d 206, the Court stated a rule which we believe to be applicable to the facts of this case:

> "In the instant case we find no evidence to suggest that respondent ever had a bona fide doubt as to the union's majority status. * * * Not once during the January 30 or February 6 meetings did respondent challenge the union's right to represent the employees. On both of these occasions the union informed respondent that a majority of its employees had signed union cards. There was no necessity for the union to offer proof of the genuineness of its majority claim absent a challenge by respondent." 211 F. 2d 206, 210.

The Board had more than ample evidence before it to sustain its findings that Skyline Homes engaged in interrogation and warning of its employees in violation of Section 8(a)(1); and it could scarcely have reached any conclusion other than that there was a wrongful refusal to bargain. *Cf. NLRB v. Herbert Cotton Mills*, 5th Cir. 1961; 289 F. 2d 903. So also we find no basis for Skyline Homes' contention that the lapse of time since the filing of the original charges entitle it to an election. An employer will not be permitted to dissipate the union's majority by a series of Section 8(a)(1) violations and then demand that an election be held. *Frank Bros. Co. v. NLRB*, 321 U. S. 702, 64 S. Ct. 819, 88 L. Ed. 1020; *NLRB v. Philoman Laboratories, Inc.*, *supra*, at 181-83; *Smith Transfer Co. v. NLRB*, 5th Cir. 1953, 204 F. 2d 738; see *NLRB v. Southeastern Rubber Mfg. Co.*, *supra*, at 15; *NLRB v. Poultry Enterprises, Inc.*, *supra*, at 525; *Jon Silk Mills v. NLRB*, D. C. Cir., 1950, 155 F. 2d 732, cert. den., 341 U. S. 914, 71 S. Ct. 734, 95 L. Ed. 1350. Finally, we reject the petitioner's contention that Overman without authority or authorization to negotiate, was in no position to make a demand upon the union for proof of its majority status. He was the resident manager; he took it upon himself to discuss organizational affairs with the union at some length; he acted as a conduit through which the meagre communications between the union and the company passed. In any event someone with authority should have made this point with the union if it was to be asserted.

The petition to set aside the findings and conclusions of the Board is granted with respect to those involving the layoffs alleged to be in violation of Section 8(a)(3) and (1). Otherwise it is denied. The Board's order is modified to the extent indicated above, and, as modified, is enforced.

Modified and enforced.

PETITION OF PETITIONER, SKYLINE HOMES, INC. FOR REHEARING

Now comes Skyline Homes, Inc., an Indiana Corporation, by Davidow & Davidow, its attorneys, and respectfully petitions this Court for a rehearing of only those portions of the opinion filed by this Court on October 11, 1963 in the above cause in which this Court affirmed two of the findings of the Respondent, to-wit: (a) "that at (the petitioner) interrogated and threatened its employees in violation of Sec. 8-(a) (1) of the Act" and (b) "that it (the petitioner) refused to bargain in good faith with the United Brotherhood of Carpenters and Joiners in violation of Sec. 8-(a) (5) and (1) of the same Act" for the following reasons:

1. That while the petitioner did interrogate some of its employees, it did not threaten them, as appears by the testimony of witnesses at the hearing before the Trial Examiner.

2. That petitioner had the right to express its opinion on the matter of labor unions and related subjects as long as it did not express "any threat of reprisal or force or promise of benefit", as provided in Section 8-(c) of the Labor Management Relations Act, of 1947, as amended.

3. That both petitioner and the union expected an election following disposition of the unfair labor practice and charges made by the union.

4. That the Federal Statute (Labor-Management Relations Act, 1947, as amended) and the rules of the National Labor Relations Board stay all action, including the question of representation, until the Board has passed upon and disposed of the charges of unfair labor practices (Sec.

tion 10 (b) of the Act. That petitioner relied upon the practice in relation to said section as it was advised and therefore no action was taken in reference to an election.

5. That the lapse of time from June 23, 1960, when the first charge of unfair labor practice on the part of the petitioner was filed by the Union with the National Labor Relations Board, to October 11, 1963, the date of the opinion of this Court filed in this Court and cause, can not be attributable to petitioner and was beyond its control.

6. That as appears by the affidavit of Arthur J. Desso, President of petitioner, a copy of which is attached hereto and made a part hereof, only four of the 37 employees working for petitioner on June 23, 1960 are now working for the petitioner; that the other former employees left the employ of petitioner; that there is now a labor force of fifty employees working for petitioner in its plant at Ocala, Florida; that there is grave doubt that the Union represents a majority of the present fifty employees working for petitioner; that an election affords the only fair and sure way of determining whether the Union has the right to claim to be speaking for petitioner's employees in Ocala, Florida.

7. That unless a rehearing is granted, petitioner will suffer great and irreparable injury in that it will be compelled to bargain with the Union without any opportunity to have an election as provided in Section 9 (c) (B) of the Labor Management Relations Act, and Sec. 102.60 of the Rules and Regulations of the National Labor Relations Board.

8. Petitioner respectfully requests the opportunity for oral argument in support of its petition.

This petition is based upon the files and records of this Court and cause, the affidavit of Arthur J. Deeio, President, of petitioner, the original of which is filed herewith, and Sections 8 (c), 10 (m) and 9 (e) (B) of the Labor Management Relations Act of 1947, as amended.

DAVIDOW & DAVIDOW,
By: LARRY S. DAVIDOW,
Attorneys for Petitioner,
3210 Book Tower,
Detroit 26, Michigan.

CERTIFICATE OF COUNSEL FOR PETITIONER

I, the undersigned, Larry S. Davidow, a member of the law firm of Davidow & Davidow, attorneys for the petitioner in the above cause, do hereby certify that I have had personal charge of the above matter, and that the foregoing petition for rehearing is presented in good faith and not for delay, and that I am duly authorized to present said petition on behalf of petitioner.

Larry S. Davidow.

Dated at Detroit, Michigan,
October 30, 1963.

AFFIDAVIT IN SUPPORT OF PETITION FOR REHEARING

Skyline Homes, Inc.
Petitioner,
Versus
National Labor Relations Board
Respondent
=19352

Arthur J. Decio being duly sworn deposes and says that he is President of the Skyline Homes, Inc. an Indiana corporation, the Petitioner in the above entitled cause and that he makes this affidavit in support of a petition for rehearing of the above entitled matter, and is duly authorized so to do.

This Deponent further says that of the approximately thirty employees who were in the employ of the Petitioner of the corporation in Ocala, Florida, in June 1960, only four are now so employed, the rest having left the employ of the Petitioner voluntarily: Deponent further says that at the present time there are now employed in the Ocala plant of the Petitioner, fifty employees so that forty-six could not have been represented by the Union in June 1960. This Deponent further says that following the communication from his then factory manager in June 1960, he called upon his attorney, Larry S. Davidow of Detroit, Michigan to go down to Ocala, Florida for the purpose of meeting with representatives of the Carpenters Union and that this Deponent is informed and believes it to be true and charges the facts to be that said Larry S. Davidow arrived in Ocala, Florida for the purpose of meeting with the Union representatives there. That on the morning of his arrival, there had been delivered to the Petitioner at its Ocala, office a

copy of a charge made by the Carpenters Union and filed with the National Labor Relations Board in Tampa, Florida, asserting that the Petitioner had been guilty of certain unfair labor practices acts. Deponent was informed by Larry S. Davidow his attorney, that the filing of such unfair labor practices charges, suspended all further matters that could have been taken up with the National Labor Relations Board including the question of representation. That Deponent in reliance upon such information, which is as Deponent is informed and believes to be true and charges the fact to be, was also the opinion of the Union representatives namely; that until the unfair labor charge was disposed of, nothing further could be done including the question of representation and election. This Deponent and his counsel did proceed to defend against the charge of unfair labor practices acts with the expectation that upon the disposition of the charge by the National Labor Relations Board, that then would be considered the question of representation either by consent or by election.

Deponent further says that he has been informed by his counsel that the Petitioner has not been guilty of any delay or laches in presenting and prosecuting the claim and position of the Petitioner and that the time involved between the filing of the charge by the Union in June 1960 and the final determination by the Court of Appeals of the Fifth Circuit was entirely beyond the control of the Petitioner.

Deponent further says and offers it as his opinion that it will be manifestly unfair to compel the Petitioner to deal with the Carpenters Union as the exclusive bargaining agent of Petitioner's employees when only four out of the present fifty now working for Petitioner were employed in June 1960.

That this Deponent expresses on behalf of Petitioner that there is a grave, genuine and sincere doubt as to the right of the Carpenters Union to speak as bargaining agent for the employees of the Petitioner.

/s/ Arthur J. Decio.

Subscribed and sworn to before me, a Notary Public this 22nd day of October, 1963.

/s/ Juanita Rowe (Smith),
Notary Public, Elkhart County, Indiana.
My commission expires January 23, 1965.

ORDER DENYING PETITION FOR REHEARING

(November 13, 1963)

Before Tuttle, Chief Judge, and Jones and Gewin, Circuit Judges.

Per Curiam

It is ordered that the petition for rehearing in the above entitled and numbered cause be, and it is, hereby denied.

DECREE

Before: Tuttle, Chief Judge, and Jones and Gewin, Circuit Judges.

By the Court:

This cause came on to be heard upon a petition for review and a cross petition for enforcement of an order of the National Labor Relations Board issued November 14, 1961. The Court heard argument of respective counsel

on January 17, 1963, and has considered the briefs and transcript of record filed in this cause. On October 11, 1963, the Court, being fully advised in the premises, handed down its opinion granting enforcement of the Board's order as modified. In conformity therewith, it is hereby

Ordered, adjudged and decreed by the United States Court of Appeals for the Fifth Circuit that Skyline Homes, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively in good faith concerning wages, hours, and other terms and conditions of employment with the United Brotherhood of Carpenters and Joiners of America, Carpenters Union No. 2292, as the exclusive representative of all its employees in the following appropriate unit: All production and maintenance employees of Skyline Homes, Inc. employed at its Ocala plant, exclusive of all other employees and all supervisors as defined in Section 2(11) of the National Labor Relations Act (hereinafter called the Act);

(b) Warning or interrogating employees concerning their membership in or activities on behalf of the above-named Union, or any other labor organization;

(c) In any other manner interfering with, restraining or coercing such employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Upon request bargain collectively with the United Brotherhood of Carpenters and Joiners of America, Carpenters Union No. 2292 as the exclusive representative of all the employees in the appropriate unit and embody in a signed agreement any understanding reached;

(b) Post at its plant at Ocala, Florida, copies of the notice attached hereto as the Appendix. Copies of said notice to be furnished by the Regional Director for the Twelfth Region (Tampa, Florida) shall, after being duly signed by Skyline Homes, Inc., or its representatives, be posted by Skyline Homes, Inc. immediately upon receipt thereof and be maintained by it for sixty (60) days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Skyline Homes, Inc. to insure that said notices are not altered, defaced, or covered by any other material.

(c) File with the said Regional Director within ten (10) days from the date of this Decree a written report setting forth in detail the steps which Skyline Homes, Inc. has taken to comply herewith.

Entered: November 22, 1963.

APPENDIX

NOTICE TO ALL EMPLOYEES
PURSUANT TO

A decree of the United States Court of Appeals enforcing an order, as modified, of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL upon request bargain collectively with UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, CARPENTERS UNION NO. 2292, as the exclusive representative of all employees in the bargaining unit described below

with respect to rates of pay, wages, hours of employment and other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All production and maintenance employees employed at the Ocala, Florida, plant, exclusive of all other employees and all supervisors as defined in Section 2(11) of the Act.

WE WILL NOT warn or interrogate our employees concerning their membership in or activities on behalf of the above-named union or any other labor organization.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist the above-named union or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection or to refrain from any and all such activities.

All our employees are free to become, remain, or refrain from becoming members of the above-named union or any other labor organization.

Skyline Homes, Inc.
(Employer)

Dated..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date it bears and must not be altered, defaced, or covered by any other material.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the Board's proposed decree in the above-captioned case has this day been served by first class mail upon the following counsel at the address listed below:

Messrs. Davidow & Davidow
Att: Larry S. Davidow, Esquire
Suite 3219, Book Tower
Detroit 26, Michigan

/s/ Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board

Dated at Washington, D. C.
this 17th day of October, 1963.

ORDER STAYING PROCEEDINGS

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20029

Skyline Homes, Inc.,
Petitioner,
versus
National Labor Relations Board,
Respondent.

On consideration of the application of the petitioner in the above numbered and entitled cause for a stay of proceedings in order to enable petitioner to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issuance of the decree

of this Court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this Court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the decree upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this Court within that time.

Done at New Orleans, La., this 22nd day of November, 1963.

/s/ Warren L. Jones,
U. S. Circuit Judge.

(Original filed—November 26, 1963.)